

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RAY M. BROOKS**

Claimant

VS.

**HAWKER BEECHCRAFT, INC.**

Self-Insured Respondent

Docket No. 1,059,392

**ORDER**

**STATEMENT OF THE CASE**

Claimant appealed the April 19, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. R. Todd King of Wichita, Kansas, appeared for claimant. Brent M. Johnston of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 19, 2012, preliminary hearing and exhibit thereto; and all pleadings contained in the administrative file.

**ISSUES**

Claimant alleges he injured his right knee on October 27, 2011, while working for respondent. Claimant also alleges he gave notice of the injury to respondent on November 17, 2011. The ALJ determined claimant's notice of injury was untimely, as it was more than 20 days after claimant last worked for respondent. Claimant asserts K.S.A. 2011 Supp. 44-520(a)(1) requires him to give notice by the earliest of: (1) within 30 calendar days after the accident, (2) within 20 calendar days after he first received medical treatment, or (3) within 20 calendar days after he last worked for respondent. Claimant argues he last worked for respondent on November 18, 2011. Therefore, claimant asserts his notice to respondent was timely under any of the deadlines imposed by K.S.A. 2011 Supp. 44-520(a)(1). Respondent asks the Board to affirm the ALJ's finding.

Did claimant provide timely notice of his injury to respondent?

**FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant alleges he injured his right knee on October 27, 2011, while working for respondent. The parties agreed October 27, 2011, was claimant's last physical day at work, but that claimant's employment relationship with respondent continued until November 18, 2011. Claimant was terminated on November 18, 2011, as part of a mass layoff. It is also agreed that claimant performed no physical labor for respondent from October 27, 2011, through November 18, 2011. However, he did receive a paycheck during that time period. The parties further agreed claimant gave notice of his injury to respondent on November 17, 2011, which was 21 days after claimant's injury on October 27, 2011.

Claimant proffered and respondent did not object that claimant had a job offer from another employer prior to November 18, 2011. However, the other potential employer would not hire claimant until his employment relationship with respondent ended.

An April 5, 2012, medical report of Dr. Pedro A. Murati indicates claimant called his family physician on October 31, 2011. Claimant underwent x-rays on November 1, 2011, which was the first medical treatment he received for the alleged right knee injury.

The ALJ ruled at the preliminary hearing that claimant did not give timely notice and said:

The statute mandates that I go to the earliest of the three alternatives. We evaluate all three of the alternatives. The earliest alternative would be November -- or 20 calendar days after the last day of actual work, and under that construction, claimant gave notice on the 21st day and notice is not timely.<sup>1</sup>

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2011 Supp. 44-520(a) states in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

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<sup>1</sup> P.H. Trans. at 14.

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Respondent argues the deadline for claimant to give notice is set out in K.S.A. 2011 Supp. 44-520(a)(1)(C). Respondent asserts claimant last worked for respondent on October 27, 2011. Therefore, claimant was required to give notice to respondent on November 16, 2011, or 20 calendar days after claimant's last day of actual work for respondent.

If the Board were to reject respondent's argument, then pursuant to K.S.A. 2011 Supp. 44-520(a)(1)(B), the earliest date claimant was required to give notice was November 21, 2011, or within 20 calendar days after November 1, 2011, the date claimant first sought medical treatment. Under this scenario, claimant's notice to respondent given on November 17, 2011, would be timely.

The dispute between the parties centers around the meaning of the phrases "no longer works for" and "employee's last day of actual work for the employer" in K.S.A. 2011 Supp. 44-520(a)(1)(C). Respondent contends the Kansas Legislature intentionally used the words "works for" rather than "employed by." It then argues *Bergstrom*<sup>2</sup> requires the plain language of K.S.A. 2011 Supp. 44-520(a)(1)(C) be applied. Consequently, October 27, 2011, was the last day claimant actually "work[ed] for" respondent as stated in K.S.A. 2011 Supp. 44-520(a)(1)(C).

Claimant acknowledges the last day he physically worked for respondent was October 27, 2011. However, claimant contends he worked for respondent until November 18, 2011, claimant's last date of employment. In support of his argument, claimant avers that between October 27 and November 18, 2011, he received a paycheck, was subject to call back and was under contract to work for respondent. In his brief claimant's attorney stated, "The claimant would argue that any other interpretation of this plain reading, other than 'works for' means 'employed by', would be patently inequitable."<sup>3</sup> Claimant also asserts that the fact K.S.A. 2011 Supp. 44-520(a)(1)(C) does not use the term "physical labor" indicates the Kansas Legislature contemplated that "works for" contemplates getting paid, subject to call, subject to direction of supervisors, furlough, medical leave, light duty, regular duty, at break, at rest, on vacation, etc.

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<sup>2</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>3</sup> Claimant's Brief at 2 (filed May 14, 2012).

This Board Member affirms the preliminary hearing Order of ALJ Moore in which the ALJ found claimant failed to sustain his burden of proving that timely notice was provided. When drafting K.S.A. 2011 Supp. 44-520(a)(1)(C) the Kansas Legislature used the phrases “no longer works for” and “employee’s last day of actual work for the employer.” The plain and unambiguous meaning of the term “last day of actual work” is the last day an employee physically performs work activities for his or her employer. The definition of “works for” put forth by claimant is overly broad. Claimant’s theory is essentially that the terms “works for” and “employed by” have the same meaning. If claimant’s argument were adopted, an employee who no longer performed work activities for an employer would be deemed to “work for” the employer until the employment relationship was terminated, which in turn could result in an unintended extension of the notice deadline.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>5</sup>

#### **CONCLUSION**

Claimant did not provide timely notice of his injury to respondent.

**WHEREFORE**, the undersigned Board Member affirms the April 19, 2012, preliminary hearing Order entered by ALJ Moore.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2012.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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<sup>4</sup> K.S.A. 2011 Supp. 44-534a.

<sup>5</sup> K.S.A. 2011 Supp. 44-555c(k).

c: R. Todd King, Attorney for Claimant  
tking@kbafirm.com; trod@kbafirm.com

Brent M. Johnston, Attorney for Respondent  
bjohnston@mvplaw.com; mvpkc@mvplaw.com

Bruce E. Moore, Administrative Law Judge